

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:5:SLC:POSTF-102065-02
MHHHoward

date: February 13, 2002

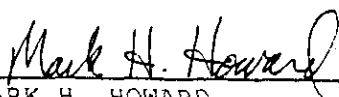
to: LMSB, Salt Lake City
Attention: Richard Druk and Erling Holje

from: MARK H. HOWARD
Special Litigation Assistant

subject: [REDACTED] Inc. and Subsidiaries
Tax Years: [REDACTED] and [REDACTED] (short year)
Proper signature for Form 870 and Form 872

On January 17, 2002, we sent you an opinion in response to your message requesting assistance in determining the proper signature for a Form 870 agreeing to the liability shown in the audit report and for a Form 872 extending the statute of limitations for assessment for the tax year [REDACTED] and the short tax year [REDACTED]. We sent that opinion for post-review by the Office of Chief Counsel and have received a response to that request. We have attached a copy of that response to this memorandum. While it agrees with the basic conclusion, it recommends some changes from the opinion we provided to you.

If you have any questions, please contact me at telephone number 799-6620.



MARK H. HOWARD
Special Litigation Assistant

• 20004

INFORMAL FIELD ASSISTANCE (TELEPHONE CALL)

Call Received By: Daniel Heins
Date: 01/24/2002
Symbols: CC:CORP:BR:06
Time: 4:00
Call Received From: Mark Howard
Phone: 801-799-6620
Office: CC:SB:5:SLC
District/Region: LMSB Salt Lake City

Taxpayer Name and TIN: [REDACTED] INC. and Subs
Tax Years: [REDACTED] and [REDACTED]

Case In Audit	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>	Appeals	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
Case In Litigation	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>	ISP Case	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>
Date Of Trial			CEP Taxpayer	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/>

Prior Counsel Advice:

None ☒ District ☐ Region ☐ Nat. Office ☐

Given By: Symbols:

Phone:

Principal Code Sections: Treas. Reg. § 1.1502-77, Temp. Reg. § 1.1502-77T.

Issue/Questions: (1) Who is the proper party to sign the Form 872 for the [REDACTED] Inc. and Subsidiaries Consolidated group for the taxable years ended June 30, [REDACTED], and December 31, [REDACTED] (2) Who is the proper party to sign the Form 870 for the [REDACTED] Inc. and Subsidiaries Consolidated group for the taxable years ended June 30, [REDACTED] and December 31, [REDACTED]

Facts: As stated in the incoming Non Docketed Significant advice request.

Telephone Response: We agree with Area Counsel's conclusion that [REDACTED] Inc. is the proper party to sign the Form 870 and Form 872 for the [REDACTED] Inc. and Subsidiaries consolidated group for the tax years ending June 30, [REDACTED] and December 31, [REDACTED]

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as also have been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus generally the common parent is the proper party to sign the Form 872 waiver to extend the statute of limitations and the Form 870

(Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) for all members of the group. Treas. Reg. § 1.1502-77(a). [REDACTED] Inc. was the common parent of the [REDACTED] Inc. and Subsidiaries consolidated group for the taxable years ended June 30, [REDACTED] and December 31, [REDACTED]. [REDACTED] Inc. is still in existence. Therefore, [REDACTED] Inc. is the proper party to sign the Form 870 and Form 872 for the [REDACTED] Inc. and Subsidiaries consolidated group for the above mentioned tax years in question.

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to the waiver of the statute of limitations for taxable years for taxable years for which the due date of the consolidated return is after September 7, 1988. However Temp. Reg. § 1.1502-77T does not apply to the Form 870. (The signing of the Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment) Temp. Reg. § 1.1502-77(a)(1) provides that the regulation applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence under Treas. Reg. § 1.1502-75(d). Furthermore, Temp. Reg. 1.1502-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group. Subparagraph(a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the former common parent, [REDACTED] Inc. is still in existence. Therefore, this paragraph applies and [REDACTED] Inc. is the agent for the [REDACTED] Inc. and Subsidiaries consolidated group for the taxable years ended June 30, [REDACTED] and December 31, [REDACTED]. Therefore, we agree [REDACTED] Inc. is the proper party to sign the Form 872, for the [REDACTED] Inc. and Subsidiaries consolidated group for the above mentioned tax years in question.

The caption on the Form 872 and the Form 870 should read as follows: [REDACTED] Inc. (E.I.N.) as agent for the members of the [REDACTED] Inc. and Subsidiaries consolidated group.* On the bottom of the form you should add: This is with respect to the consolidated tax liability of the [REDACTED] Inc. and Subsidiaries consolidated group for the taxable years ending June 30, [REDACTED] and December 31, [REDACTED].

We agree that the Form 872 and Form 870 should be signed by a current officer of [REDACTED] Inc. The signature blocks on the Form 870 and Form 872 should be signed as follows: [REDACTED] Inc.

President of [REDACTED] Inc.

With respect to the signature block, [REDACTED] a current officer of [REDACTED] Inc., should sign the Form 870 and Form 872 for just [REDACTED] Inc. and not for its subsidiaries. A current officer should sign on behalf of the agent of the group. The agent of the group is [REDACTED] Inc.

The other language below the line is not correct (President of [REDACTED] Inc. successor in interest to [REDACTED] Inc. and Subsidiaries consolidated group.) Successorship is a state law concept and there is no successor here of an entire group. Furthermore, [REDACTED] is neither a successor of [REDACTED] Inc. nor is it a successor of any of the subsidiaries of [REDACTED] Inc.

You should make sure that [REDACTED] is currently the President of [REDACTED] Inc.

You should make sure that [REDACTED] Inc. is still in existence at the time the Forms 870 and 872 are signed.

According to the incoming facts [REDACTED] agreed to pay all of the tax liabilities of [REDACTED] Inc. (or possibly all the tax liability the [REDACTED] Inc. group). This would appear to make [REDACTED] a transferee. (transferee at law under a third party beneficiary theory) The field may want to also consider getting from [REDACTED] a Form 977 (extending the statute on transferee liability) and maybe also a Form 2045 (admitting that it is a transferee). However, before doing so, you should consult the procedural group. (APJP).

I.R.C. § 6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period.

Further Action Needed: Yes [] No [X]
Describe:

Call Returned By: Daniel Heins
Date Call Returned: 02/04/2002
Reviewed By: Steven Hankin SJH
Office: CC:CORP:BR:06
Date: 02/01/2002

Symbols: CC:CORP:BR:06
Time Spent: 2 Hours
Phone: 202-622-7930

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB:5:SLC:POSTF-102065-02
MHHoward

date: January 17, 2002

to: LMSB, Salt Lake City
Attention: Richard Druk and Erling Holje

from: MARK H. HOWARD
Special Litigation Assistant

subject: [REDACTED], Inc. and Subsidiaries
Tax Years: [REDACTED] and [REDACTED] (short year)
Proper signature for Form 870 and Form 872

On December 19, 2001, team leader [REDACTED] sent me an e-mail message requesting assistance in determining the proper signature for a Form 870 agreeing to the liability shown in the audit report. He subsequently asked me to also determine the proper signature for a Form 872 extending the statute of limitations for assessment for the tax year [REDACTED] and the short tax year [REDACTED].

DISCLOSURE

This memorandum responds to [REDACTED]'s request dated December 19, 2001 and to his subsequent oral request. This memorandum should not be cited as precedent.

ISSUES

What wording should the Form 870 and the Form 872 contain for the tax years [REDACTED] and [REDACTED] to deal with the change in ownership of [REDACTED], Inc. and Subsidiaries.

CONCLUSIONS

We conclude that you should identify the taxpayer in the Form 870 and the Form 872 and prepare the signature block for the form 870 and the Form 872 as explained below.

FACTS

For our opinion in this case, we have relied on the facts set out below. If you believe we have incomplete or incorrect facts, you should notify us as this could change our opinion.

██████████, Inc. and subsidiaries (██████████), the taxpayer in this case, filed tax returns for the tax year ended June 30, ██████████, and for the short tax year ended December 31, ██████████. The Internal Revenue Service (IRS) has had an ongoing large case (now LMSB) audit of this taxpayer ██████████. The IRS and ██████████ have largely completed the audit of these years but wish to have the taxpayer sign a Form 870 agreeing to the audit report and they may enter into an agreement to extend the statute of limitations using a Form 872.

██████████ Inc. purchased the stock of ██████████ Inc. with an effective date of ██████████. ██████████ wished to obtain a subsidiary of ██████████ called ██████████.

██████████ sold the stock of ██████████ to ██████████ Inc. (██████████) with an effective date of ██████████, but as part of this transaction, ██████████ retained the subsidiary. This transaction also required ██████████ to pay the tax liabilities for years prior to the transfer to ██████████.

The audit team want to know who should sign the Form 870 and the Form 872 and how the wording should appear on the signature block for the person signing the Form 870 or the Form 872 for the taxpayer.

ANALYSIS

Under I.R.C. § 6501(a), the Internal Revenue Service generally has three years after a return is filed to start proceedings for the assessment of tax. Under section 6501(c)(4), the statute of limitations on assessment of tax may be waived by written agreement of the parties. Such a waiver of the statute of limitation is generally effected through the execution of Form 872, Consent to Extend the Time to Assess Tax. See, e.g. Rev. Proc. 72-38, 1972-2 C.B. 813. Although a Form 872 is a unilateral waiver of a defense by the taxpayer rather than a contract, contract principles may be useful for purposes of determining whether the parties have reached a written agreement, as required by I.R.C. § 6501(c)(4). Schulman v. Commissioner, 93 T.C. 623, 639 (1989); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983), acq. 1984-2 C.B. 2.

Under I.R.C. § 6062, a corporate tax return may be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to sign. Also under that section, the fact that an individual's name is signed on a corporate return is prima facie evidence that the individual is authorized to sign the return on behalf of the corporation. Any officer who is authorized to sign the

corporation's return may execute a Form 872 on behalf of the corporation, regardless of whether that person signed the return. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified by Rev. Rul. 84-165, 1984-2 C.B. 305.

For a consolidated group, the common parent is the agent for all members of the group and is the proper party to execute a Form 872 on behalf of the group. Treas. Reg. § 1.1502-77(a). A Form 872 executed by the common parent to extend the limitations period for assessment with respect to a consolidated return year is applicable to each corporation that was a member of the group during any part of the consolidated return year. Treas. Reg. § 1.1502-77(c)(1). The common parent for a particular year remains the agent for the members of the group for that year until the common parent goes out of existence. This is so even if a member leaves the group or if the group terminates. Treas. Reg. § 1.1502-77(a); Craigie, Inc. v. Commissioner, 84 T.C. 466, 472 (1985).

If the common parent of the group ceases to be the common parent, regardless of whether the group remains in existence, Temp. Treas. Reg. § 1.1502-77T provides that a Form 872 executed by an alternative agent is deemed to be given by the agent for the group. (This provision applies for taxable years for which the due date of the consolidated return is after September 7, 1988.) In particular, an alternative agent may be (i) the common parent of the group for all or any part of the year to which the Form 872 applies or (ii) a successor to the former common parent in a transaction to which I.R.C. § 381(a) applies. Temp. Treas. Reg. § 1.1502-77T(A)(4)(i) and (ii).

Although [REDACTED] a common parent since it became a member of the [REDACTED] group on [REDACTED] and then became a member of the [REDACTED] group on [REDACTED], you have indicated that it continued to exist as a member of the [REDACTED] group and then the [REDACTED] group. Therefore, it remains as the agent for the [REDACTED] and [REDACTED] consolidated returns of the [REDACTED] group for those years. You have also indicate that the person who would sign the Form 870 currently serves as a corporate officer of both [REDACTED] and of [REDACTED]. We suggest the following language for the taxpayers' name on the Form 872:

[REDACTED], Inc. (EIN [REDACTED]) and
Subsidiaries.

The Tax Court has approved the language on the Form 872 instructions directing that, "If the taxpayer is a corporation, this consent must be signed with the corporate name followed by the signature and title of the officer(s) authorized to sign."

See, Pleasanton Gravel Company v. Commissioner, 85 T.C. 839 (1985). The IRS should have the signature block for the corporate agreements conform to those instructions. The Form 872 should be signed by a currently authorized officer of [REDACTED]. You have indicated that [REDACTED] signed the power of attorney for this taxpayer as an officer of both [REDACTED] and [REDACTED]. While we do not know his official position with either entity, we have assumed he fills the role of president for both entities for purposes of preparing a sample signature block below. You will need to adjust the signature block to reflect the correct person and title. We recommend that the signature block indicate the following:

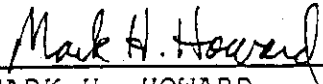
[REDACTED], Inc. and Subsidiaries.

By: _____

President of [REDACTED], Inc. and
Subsidiaries and
President of [REDACTED], Inc.
successor in interest to [REDACTED]
Inc. and Subsidiaries consolidated group

The analysis above on the proper party and signature block for the Form 872 would also apply to the Form 870. The proper party and authorizing signature will depend in each instance on the same Treasury Regulations under I.R.C. § 1502.

If you have any questions about the matters addressed in this memorandum, please contact me at telephone number (801) 799-6620.



MARK H. HOWARD
Special Litigation Assistant